

SOUTH CAROLINA PUBLIC SERVICE COMMISSION

HEARING OFFICER DIRECTIVE

DOCKET NOS. [2017-370-E](#), [2017-207-E](#), [2017-305-E](#) ORDER NO. 2018-117-H

AUGUST 17, 2018

David Butler
Hearing Officer

DOCKET DESCRIPTION:

Docket No. 2017-370-E – Joint Application and Petition of South Carolina Electric & Gas Company and Dominion Energy, Incorporated for Review and Approval of a Proposed Business Combination between SCANA Corporation and Dominion Energy, Incorporated, as May Be Required, and for a Prudency Determination Regarding the Abandonment of the V.C. Summer Units 2 & 3 Project and Associated Customer Benefits and Cost Recovery Plans

Docket No. 2017-207-E – Friends of the Earth and Sierra Club, Complainant/Petitioner v. South Carolina Electric & Gas Company, Defendant/Respondent

Docket No. 2017-305-E – Request of the Office of Regulatory Staff for Rate Relief to South Carolina Electric & Gas Company's Rates Pursuant to S.C. Code Ann. § 58-27-920

MATTER UNDER CONSIDERATION:

Interim Order on ORS Motion for Sanction and Motion to Compel

HEARING OFFICER ACTION:

After reviewing all the documents related to the Office of Regulatory Staff's ("ORS's") "Motion to Sanction Joint Applicants and to Compel Production of Wrongfully Withheld Documents in Joint Applicants' Privilege Log," this Hearing Officer is – thus far – far from convinced that the ORS Motion should not be granted. The actual production so far by South Carolina Electric & Gas Company ("SCE&G") is troubling, since SCE&G's Response to the ORS Motion to Compel stated as follows:

SCE&G, through its parent company SCANA, has decided to produce documents that provide the full account of the Bechtel engagement and assessment, including the communications related to the engagement of Bechtel and the ensuing Bechtel Report (emphasis added).

SCE&G further stated that “ORS has sought the production of the Bechtel Report and ‘its drafts, alternative reports, working papers, references, responses, and other related documents, including all communications relating to the assessment of the Report.’ ..As noted SCE&G will produce these materials (emphasis added).” In addition, SCE&G went so far as to claim that its decision to disclose the privileged Bechtel Materials rendered the remainder of ORS’ motion moot. This Hearing Officer’s Directive gave short shrift in the analysis of this issue, based on the apparent agreement of SCE&G to produce the Bechtel documents.

In its Response to the present ORS Motion, SCE&G states that it “did exactly what it agreed to do and what it was ordered to do” by producing non-privileged documents and a privilege log. The inconsistency of the language is striking. In the response to the Motion to Compel, SCE&G appears to have clearly waived the privilege for the Bechtel documents (with the below-noted footnoted exception for independently protected documents), and indeed promised to produce the materials. In the Response to the present ORS motion, SCE&G asserts that it complied with the Hearing Officer’s Order by producing non-privileged materials and a privilege log. The SCE&G responses appear to be disingenuous. The release of several more Bechtel documents does nothing to cure this issue.

Further, the footnote appearing on page 5 in SCE&G’s response to the original Motion to Compel does not bolster SCE&G’s position, as it appears to reserve the right to withhold Bechtel documents based on a claim of privilege, when SCE&G has an independent basis for doing so. SCE&G seems to have used this footnote to renege on its pledge to produce the privileged Bechtel documents which appeared in its response to ORS’s original Motion to Compel. In addition, SCE&G has stated no “independent basis” for withholding documents under a privilege, as described in the footnote. I cannot conclude from the present filings that SCE&G has complied with the previous Order on the ORS original Motion to Compel.

In addition, SCE&G appears to be withholding documents in response to ORS Request 5-26 for no persuasive reason. SCE&G has conceded that documents responsive to Request 5-26 are business-related communications and studies at the heart of these proceedings. SCE&G has not shown thus far that these documents were prepared for a predominantly legal purpose. The privilege log appears to bolster the business-related nature of the documents.

Even given the seeming clarity of the violations of this Hearing Officer's Order on the original Motion to Compel, the nature and severity of one of the sanctions proposed by ORS, i.e., that SCE&G should not be allowed to include any costs incurred after at least October 22, 2015, is enough for this Hearing Officer to "go back to the well" one more time, and request that SCE&G and/or Dominion Energy, Inc. ("Dominion") provide any other information that they may believe is relevant, prior to a ruling on the latest Motion for Sanction and Motion to Compel. SCE&G has until the close of business on Tuesday, August 21, 2018 to provide such information. If ORS believes that a Response is appropriate, ORS may respond to any additional SCE&G/Dominion filing by the close of business on Wednesday, August 22, 2018.

This ends the Hearing Officer's directive.